IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRETT EUGENE THOMAS, Appellant.	No. 32888-7-II consolidated with No. 33358-9-II UNPUBLISHED OPINION

HOUGHTON, P.J. -- After being charged with 13 counts of assault, kidnapping, robbery, burglary, and possession of a firearm for committing two home invasions,[1] Brett Thomas entered into a plea agreement with the State. He appeals from the trial court's denial of his motion to withdraw his pleas. He argues that (1) the trial court erred by not recusing itself, (2) the State breached the plea agreement, (3) the plea agreement violated public policy, (4) he received ineffective assistance of counsel, and (5) the trial court committed numerous errors in imposing its sentence. The State concedes certain sentencing errors. We remand to correct the judgment and sentence based on the State's concession, but otherwise we affirm the trial court.

FACTS

On August 21, 2003, the State charged Thomas with first degree burglary while armed with a firearm (Pritchard count I), first degree assault while armed with a firearm (Cecil Pritchard

[1] The two home invasions comprised incidents involving Cecil and Rose Pritchard and Willis Habersetzer.

count II), second degree assault while armed with a firearm (Rose Pritchard count III), two counts of first degree kidnapping while armed with a firearm (Pritchard counts VI (Cecil), VII (Rose)), two counts of first degree robbery while armed with a firearm (Pritchard counts VIII (Cecil), IX (Rose)), and first degree unlawful possession of a firearm (Pritchard count X).[2] According to the information, Thomas committed these offenses against Cecil and Rose Pritchard on or about August 17, 2003.

On May 3, 2004, the State charged Thomas with another set of offenses: first degree robbery while armed with a firearm (Habersetzer count I), first degree kidnapping while armed with a firearm (Habersetzer count II), and first degree burglary while armed with a firearm (Habersetzer count III). According to the information, he committed these offenses against Willis Habersetzer on or about August 17, 2003.

On May 20, Thomas signed a statement on plea of guilty in which he agreed to certain obligations, namely that (1) he would fully cooperate with the State in providing complete and truthful information regarding the Pritchard, Habersetzer, and Holm[3] home invasions; (2) he would take polygraph tests to ensure his truthfulness; (3) he would testify truthfully when called as a witness in the trials regarding all the incidents; (4) he would agree to pretrial interviews; (5) if he provided untruthful information or testified untruthfully at trial, the agreement would be breached, Thomas would not benefit from the agreement, and he may face additional charges; and (6) he would immediately plead guilty as charged in the Pritchard and Habersetzer cases and

[2] The State voluntarily dismissed two felony harassment while armed with a firearm charges (Pritchard counts IV, V).

[3] Although the State never charged him with the crime, Thomas agreed to provide information about the robbery of Edward and Margaret Holm that occurred on August 18, 2003.

waive all rights to speedy sentencing.

According to the plea agreement, if Thomas fulfilled these obligations, the State would join in his motion to withdraw his guilty pleas and reduce some of the charges. With regard to the Pritchard case, the State would reduce the charges to first degree assault (Cecil Pritchard count II) and first degree kidnapping (Rose Pritchard count VII). Additionally, with regard to the Habersetzer case, the State would reduce the charges to first degree assault. Accordingly, the State would recommend a standard range sentence of 237 months' incarceration.

But if Thomas failed to fully satisfy his obligations under the plea agreement, the State would oppose any motion to withdraw his guilty pleas. And the State would seek to have him sentenced on the original charges. Particularly, the State would recommend a sentence within the original standard range, but including incarceration at the high end of the range. Finally, should Thomas breach the agreement, the State would charge him with additional crimes, possibly including perjury.

Thomas entered his guilty pleas in front of Judge McPhee. Judge McPhee also presided over William Friedrichs's bench trial, Thomas's former co-defendant in the Pritchard robbery. Pursuant to his plea agreement, Thomas testified for the State at Friedrichs's trial.

In his posttrial findings of facts, Judge McPhee found Thomas's testimony not credible in several aspects. According to Judge McPhee, Thomas testified untruthfully in order to "shift the focus of the criminal acts charged in the Friedrichs case from Mr. Friedrichs to himself. [Thomas] had, frankly, little to lose in that regard, because he'd already pled guilty to those acts and risked only the possibility that he would not be able to take advantage of the terms of the Plea Agreement." Report of Proceedings (RP) (Nov. 23, 2004) at 34.

After Friedrichs's trial, Thomas moved to withdraw his guilty pleas, according to his agreement with the State. The State opposed the motion, arguing that Thomas materially breached the agreements when he testified untruthfully. After a hearing, Judge McPhee ruled, "I conclude that Mr. Thomas has materially breached the Plea Agreement that is before us here, and as a consequence of that material breach, I deny his motion to withdraw his guilty plea." RP (Nov. 23, 2004) at 32.

Thomas moved for reconsideration, asserting that due process guaranteed him a hearing before a different judge because Judge McPhee "had previously made up his mind on the very issue presented to him and argued by the State." 1 Clerk's Papers (CP) at 25. That is, Thomas argued, when Judge McPhee heard the motion to withdraw the pleas, he had already determined that Thomas testified untruthfully, thus breaching the agreement.

After hearing arguments regarding reconsideration, Judge McPhee concluded,

> The Judge who considered that agreement and approved it, the judge who would have heard the trial of Mr. Thomas as well as Mr. Friedrichs . . . was this judge. The right and opportunity to bring the matter back before the court to seek withdrawal of the earlier made guilty plea and entry of a guilty plea to lesser charges was brought before this judge, and I believe appropriately so, without violation of the defendant's constitutional right.

RP (Jan. 21, 2005) at 39.

In the Pritchard case, the trial court then imposed a sentence of 161.5 months' incarceration for first degree burglary (Pritchard count I), 300 months' incarceration for first degree assault (Pritchard count II), 109.5 months' incarceration for second degree assault (Pritchard count III), 210 months' incarceration for each first degree robbery (Pritchard counts VIII, IX), and 101.5 months' incarceration for first degree unlawful possession of a firearm

(Pritchard count X).[4]

In the Habersetzer case, the trial court imposed a 210 month sentence for first degree robbery (Habersetzer count I) and a 161.5 months sentence for first degree burglary (Habersetzer count III).[5] Except for Pritchard count X, each sentence Thomas received included a firearm enhancement.[6]

The trial court ordered that the standard range sentences run concurrently and that the

[4] The trial court found that the charge of first degree kidnapping of Cecil Pritchard (Pritchard count VI) should merge with the related first degree robbery charge (Pritchard count VIII). Similarly, the trial court merged the charge of first degree kidnapping of Rose Pritchard (Pritchard count VII) with the related first degree robbery charge (Pritchard count IX).

[5] The trial court found that the charge of first degree kidnapping of Willis Habersetzer (Habersetzer count II) should merge with the related first degree burglary charge (Habersetzer count III).

[6] The following chart outlines Thomas's offenses and related sentences:

Pritchard			
Count I		First degree burglary	161.51 months*
Count II	Cecil	First degree assault	300 months*
Count III	Rose	Second degree assault	109.5 months*
Count IV	Cecil	Felony harassment	Dismissed
Count V	Rose	Felony harassment	Dismissed
Count VI	Cecil	First degree kidnapping	Merged with Pritchard count VIII
Count VII	Rose	First degree kidnapping	Merged with Pritchard count IX
Count VIII	Cecil	First degree robbery	210 months*
Count IX	Rose	First degree robbery	210 months*
Count X		First degree unlawful possession of a firearm	101.5 months
Habersetzer			
Count I		First degree robbery	210 months*
Count II		First degree kidnapping	Merged with Habersetzer count III
Count III		First degree burglary	161.5 months*

*Sentence included firearm enhancement

firearm enhancements run consecutively. Thus, the trial court imposed a total 636 months sentence based on the standard range for Pritchard count II (240 months), plus the firearm enhancements (276 months) in the Pritchard case and the firearm enhancements (120 months) in the Habersetzer case. Thomas appeals.

ANALYSIS

Neutral Fact Finder

Thomas first contends that Judge McPhee denied him his due process right to a neutral fact finder who would decide whether he had breached the plea agreement. He asserts that Judge McPhee had already determined the ultimate issue--that he lied and violated the agreement--in a prior proceeding. He argues that this relieved the State of its burden to prove by a preponderance of the evidence that he was not truthful during his testimony.

Before relieving the State of its obligations under a plea agreement, fairness requires that the defendant have an opportunity to call witnesses in an evidentiary hearing and "other due process rights, including the requirement that the State prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement." *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982); *State v. Cassill-Skilton*, 122 Wn. App. 652, 656, 94 P.3d 407 (2004) ("'The similar rights at stake in probation revocation, plea bargain agreements, and pretrial diversions persuade us that [a defendant] is entitled to have factual disputes resolved by a neutral fact finder.'") (quoting *State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984)).

Under due process standards, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct, a court should disqualify itself if it has bias against a party or if its

impartiality is reasonably questionable. *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). A party claiming bias or prejudice must present evidence of actual or potential bias because Washington courts presume that judges perform their functions properly and without any bias. *State v. Cantu*, 156 Wn.2d 819, 834, 132 P.3d 725 (2006) (Johnson, J., dissenting); *Dominguez*, 81 Wn. App. at 328-29. "[M]ere speculation is not enough." *In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

Thomas asserts that "the State did not have to carry [its] burden at the hearing because the trier of fact had already found before the hearing that Mr. Thomas was not credible during his testimony at [the] Friedrichs bench trial." Appellant's Br. at 25. Relying on *State v. Carter*, 77 Wn. App. 8, 888 P.2d 1230 (1995), Judge McPhee rejected Thomas's argument. RP (Jan. 21, 2005) at 8-9.

In *Carter*, the State charged Carter with possession of controlled substances. 77 Wn. App. at 10. Carter entered an *Alford* plea,[7] which was subsequently vacated, and he received a sentence. *Carter*, 77 Wn. App. at 10. Later, a jury trial was set before the same judge who had accepted the *Alford* plea. Carter moved for a recusal, arguing that he could not get a fair trial because the judge had commented on his guilt during sentencing. *Carter*, 77 Wn. App. at 10. The court denied the recusal motion, and the jury found Carter guilty as charged. *Carter*, 77 Wn. App. at 10-11. On appeal, Carter contended that the trial judge should have disqualified himself from presiding over the trial because the judge had commented on his guilt in connection with his *Alford* plea. *Carter*, 77 Wn. App. at 11. Division Three affirmed, stating, "there is no evidence

[7] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 277, 744 P.2d 340 (1987) (noting that an *Alford* plea allows a defendant to plead guilty without admitting guilt).

of any prejudice or bias on the part of the judge during the course of Mr. Carter's jury trial." *Carter*, 77 Wn. App. at 12.

Here, although the procedure is reversed because the relevant trial occurred before the hearing, the only difference is that Thomas testified in a bench trial. But as the trial court correctly pointed out, this is a distinction without a difference. The trial court explained,

> How does that really differ from the case where the judge decides guilt or innocence rather than the jury? I mean, the judge who was sitting on the bench deciding the subsequent motion has heard all of the same evidence and thought about that evidence during the course of the trial, regardless of whether he's the trier of fact or the jury is the trier of fact.

RP (Jan. 21, 2005) at 10. This analysis makes sense. We need not reverse simply because the trial at issue was a bench trial instead of a jury trial. And Judge McPhee was in the best position to evaluate Friedrichs's credibility. Moreover, no one disputes that Judge McPhee was unbiased and unprejudiced during Friedrichs's trial.

Further, the issue at the plea withdrawal hearing was not only whether Thomas testified untruthfully, but also whether his untruthful testimony materially breached the agreement. The presumption that judges perform their functions regularly and properly without bias or prejudice supports the trial court's statement that "I can distinguish those arguments from the situation that presents us here." RP (Jan. 21, 2005) at 38; *Cantu*, 156 Wn.2d at 834 (Johnson, J., dissenting). Thus, due process did not require that Judge McPhee disqualify himself. Thomas's argument fails.

Plea Agreement

Thomas next contends that that the State breached the plea agreement by opposing his motion to withdraw his guilty pleas. He asserts that he should be able to specifically enforce the

agreement because he never breached it.

Washington courts construe plea agreements as contracts. *State v. Armstrong*, 109 Wn. App. 458, 461, 35 P.3d 397 (2001). "After a party breaches the plea agreement, the nonbreaching party may either rescind or specifically enforce it." *Armstrong*, 109 Wn. App. at 462. "Whenever the State elects 'to rescind a plea agreement, its subsequent rights are measured by law; but when it opts to specifically enforce, its subsequent rights are necessarily measured by the agreement itself.'" *Armstrong*, 109 Wn. App. at 462 (quoting *State v. Thomas*, 79 Wn. App. 32, 37-38, 899 P.2d 1312 (1995)).

Here, the trial court correctly decided that Thomas's untruthful testimony constituted a material breach of the plea agreement. His plea agreement provided that he would testify truthfully at trial and if he failed to do so, he would have breached the agreement, he would receive no benefit from the State, and he might face an additional charge. Further, the agreement stated that if Thomas failed to fulfill his obligations, the State would oppose his motion to withdraw his guilty pleas and the court would sentence him based on the original charges. These terms unambiguously provide that untruthful testimony will constitute a breach and that, should he breach the agreement, the State would be free to oppose his motion to withdraw his guilty pleas. This is what happened here.

During Friedrichs's trial, Thomas testified that he held the gun, that he forced his way into the Pritchard residence, and that he never saw Friedrichs commit any violent acts against the victims. In contrast, Cecil Pritchard testified that Friedrichs beat him and that Friedrichs had a gun and forced himself into the house. The testimony of another co-defendant, Jarred Colombo, supported Pritchard's description of the events. Judge McPhee, as the fact finder, found

Thomas's testimony not credible. And Thomas's testimony, as contradicted by Pritchard and Colombo, shows that he testified untruthfully in order to protect Friedrichs.[8]

Because Thomas testified untruthfully in Friedrichs's trial in several material aspects that constituted a material breach of the plea agreements, he has no right to specific enforcement. *James*, 96 Wn.2d at 850 (defendant's right to specifically enforce a plea agreement "exists provided the defendant has complied with the agreement"). Conversely, the State had the right to specifically enforce the agreement or to rescind it. Thus, the State did not breach the agreement by opposing Thomas's motion to withdraw his guilty pleas.

Additionally, Thomas argues that the terms of the plea agreement requiring the State to prove his untruthful testimony by a preponderance of the evidence violated public policy. That is, he asserts, the terms lowered the standard of proof to prove perjury from a beyond reasonable doubt standard to a preponderance of the evidence standard. This argument misses the point and lacks merit.

As stated, due process requires "the State [to] prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement." *James*, 96 Wn.2d at 850. Thus, our Supreme Court has already held that it does not violate public policy to require the State to prove the defendant's violation of the agreement (Thomas's untruthful testimony) by a preponderance of the evidence.

Moreover, the State never charged Thomas with perjury. Even if it did, its charging him would not lower the State's burden. Notably, the agreement simply states provides that if he fails

[8] Thomas also argues that his inconsistent testimony stemmed from his years of drug use and resultant mental problems. But the clarity of Thomas's testimony belies this claim.

to comply with the agreement, the State would charge additional crimes, including perjury. Nothing in the agreement indicates that the State has a lesser burden in proving perjury. Thomas's burden of proof argument fails.

Ineffective Assistance of Counsel

Thomas also contends that his "counsel failed to effectively assist him in deciding to plead guilty by placing him at risk of having a finder of fact--in this case Judge McPhee--enter specific, explicit findings regarding Mr. Thomas' testimony in the Friedrich[s] matter." Appellant's Br. at 36-37. He asserts ineffective assistance of counsel based on his counsel's failure to "foresee the possibility of a bench trial," that could result in specific findings that would foreclose his rights under the plea agreement. Appellant's Br. at 37; Appellant's Reply Br. at 4.

A defendant has the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant demonstrates ineffective assistance by demonstrating that (1) counsel's representations fell below an objective and reasonable standard and (2) counsel's errors were serious enough to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). "This second element is proved 'when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 421, 114 P.3d 607 (2005) (quoting *Hendrickson*, 129 Wn.2d at 78).

Here, Thomas offers nothing demonstrating that he would have decided to proceed to a trial instead of agreeing to a plea agreement had his counsel discussed the possibility that he would have to testify in a bench trial. He states, "Counsel's failure to object to the testimony can reasonably be termed prejudicial *per se*." Appellant's Reply Br. at 4. As the State correctly pointed out at argument, Thomas's problem had nothing to do with having a bench trial; it was his lying that put him in jeopardy. And even if we assume deficient representation, Thomas fails to

show prejudice, depriving him of a fair trial. His ineffective assistance of counsel argument fails.[9]

Sentence

State's Concessions

Thomas next contends that the trial court erred in imposing a sentence that violates the doctrines of same criminal conduct, double jeopardy, and statutory merger. The State concedes that the trial court erred in including the kidnapping charges in calculating Thomas's offender score with regard to the Pritchard case (Pritchard counts VI, VII) and the Habersetzer case (Habersetzer count II).

The parties agree that this error did not affect the length of Thomas's sentence because the trial court did not impose any sentence on the kidnapping charges and because Thomas's offender score is above nine even without including the kidnapping charges in both the Pritchard and Habersetzer cases. Nevertheless, Thomas asks us "to remove the merged kidnapping offenses." Appellant's Reply Br. at 5. The State concedes that the kidnapping charges should be removed from the judgment and sentence. We accept the State's concession.

The State also concedes that "the prohibition against double jeopardy requires" the second degree assault charge (Pritchard count III) to merge with the first degree robbery charge

[9] In his Statement of Additional Grounds (SAG), RAP 10.10, Thomas raises additional ineffective assistance of counsel claims that fail for the same reasons. In his SAG, he argues that counsel (1) failed to raise a defense, (2) gave poor advice to accept a bad plea agreement, (3) advised Thomas to plead to an invalid contract, (4) failed to preserve the record at sentencing and to raise defenses regarding sentencing, (5) failed to object to the introduction of a co-defendant's unsubstantiated statements, (6) improperly withdrew a change of venue motion, and (7) failed to request a competency evaluation and hearing. SAG at 27-32.

(Pritchard count IX) because "they constitute the same offense" under *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). Resp't's Br. at 36, 39.

In *Freeman*, our Supreme Court noted, "Under the merger rule, assault committed in furtherance of a robbery merges with robbery . . . without contrary legislative intent or application of an exception." 153 Wn.2d at 778. The *Freeman* court then concluded that "the merger doctrine applie[d] to merge [the defendant's] first degree robbery and second degree assault convictions." 153 Wn.2d at 778. Here, Thomas pleaded guilty to second degree assault for threatening Rose Pritchard in order to carry out the robbery. Accordingly, the State agrees that Thomas's second degree assault charge (Pritchard count III) should merge with his first degree robbery charge (Pritchard count IX).

We also accept this concession. The remedy is to remand to correct the judgment and sentence without including the kidnapping charges (Pritchard counts VI, VII) and the second degree assault charge (Pritchard count II), and the kidnapping charge (Habersetzer count II) in the Habersetzer case.

Same Criminal Conduct

Thomas next contends that the charges in each of the following categories constitute the same criminal conduct: (1) Pritchard counts I, II, VI, and VIII; (2) Pritchard counts I, III, VII, and IX in the Pritchard case;[10] and (3) the offenses in the Habersetzer case.[11] According to

[10] These charges refer to: first degree burglary (Pritchard count I), first degree assault against Cecil Pritchard (Pritchard count II), second degree assault against Rose Pritchard (Pritchard count III), first degree kidnapping of Cecil Pritchard (Pritchard count VI), first degree kidnapping of Rose Pritchard (Pritchard count VII), first degree robbery of Cecil Pritchard (Pritchard count VIII), and first degree robbery of Rose Pritchard (Pritchard count IX).

[11] These charges refer to: first degree robbery (Habersetzer count I), first degree kidnapping

Thomas, category (1) includes offenses committed against Cecil Pritchard, category (2) includes offenses against Rose Pritchard, and category (3) includes offenses against Habersetzer. As stated above, the State concedes that Pritchard counts III, VI, and VII should merge with Pritchard counts VIII and IX and that Habersetzer count II should merge with Habersetzer count III. Thus, we address only the arguments regarding the remaining charges here--(1) Pritchard counts I, II, and VIII; (2) Pritchard counts I and IX; and (3) Habersetzer counts I and III.

Generally, the trial court determines the sentencing range for each current offense by adding together the offender score from all other current offenses and prior convictions. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). But if the court finds that all or some of the current offenses encompass "the same criminal conduct," then those offenses count as one crime. RCW 9.94A.589(1)(a). The statute defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Absent any one of these elements, the trial court must score each offense separately. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). We will not disturb a trial court's decision regarding same criminal conduct absent a clear abuse of discretion or a misapplication of the law. *State v. Calvert*, 79 Wn. App. 569, 577, 903 P.2d 1003 (1995).

Thomas's argument regarding the burglary charges in both cases misapplies the law. According to the burglary antimerger statute, "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. This "antimerger statute gives

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(Habersetzer count II), and first degree burglary (Habersetzer count III).

the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). Accordingly, the trial court had the discretion to impose separate sentences on the burglary charges and it did not abuse that discretion here.[12]

Finally, Thomas contends that his offenses of first degree assault and first degree robbery of Cecil Pritchard constitute the same criminal conduct. According to the certification of probable cause, one of the defendants repeatedly struck 85-year-old Cecil Pritchard in the face and head with the handle of a handgun while pushing his way into the Pritchards' house. When the police arrived, they observed a large amount of blood coming from several lacerations on Pritchard's face. Although the trial court could have viewed this assault as part of the robbery, with one crime furthering the other, it did not.

The trial court's wide discretion allowed it to determine that such a violent assault against a person of advanced age involved a separate criminal intent. Further, Thomas fails to offer any evidence challenging the trial court's discretion. Consequently, the trial court did not abuse its discretion in ruling that the assault against Cecil Pritchard formed a separate criminal conduct and in sentencing him accordingly.

Prosecutorial and Judicial Misconduct

In his Statement of Additional Grounds (SAG), RAP 10.10, Thomas also claims that prosecutorial and judicial misconduct violated several of his constitutional rights. SAG at 9, 34.

"In a claim of prosecutorial misconduct, the defendant bears the burden of establishing

[12] This applies to Pritchard count I in categories (1) and (2) and Habersetzer count III in category (3).

that the conduct complained of was both improper and prejudicial." *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). We will reverse a conviction "only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

Thomas fails to establish that any of the prosecution's conduct was improper, let alone prejudicial. The record does not support any of his 13 prosecutorial misconduct claims.[13] SAG at 9-26. The same applies to his judicial misconduct claim.[14] SAG at 34-37. Because he fails to meet his burden, we do not further discuss these arguments.

[13] To paraphrase Thomas, he argues that: (1) the prosecutor prejudiced the sentencing hearing; (2) the prosecutor's request that Thomas testify about facts he did not know or remember was impermissible and prejudiced future hearings; (3) the prosecutor did not notify Thomas that he must testify as directed rather than truthfully in order to receive his promised pleas; (4) the prosecutor was vindictive; (5) the prosecutor committed misconduct on venue issues; (6) the prosecutor overcharged him; (7) the prosecutor's improper conduct influenced and prejudiced the court; (8) the prosecutor urged the trial court to impose a disproportionate and unjust sentence when compared with the co-defendants'; (9) a cumulative pattern of behavior shows vindictiveness; (10) the prosecutor's findings and conclusions contained numerous inaccuracies and false statements; (11) the prosecutor failed to fully inform Thomas of the consequences of entering into the plea agreement; (12) the prosecutor had a duty to ask the trial court to recuse itself; and (13) the prosecutor engaged in vindictive delay tactics. SAG at 9-26.

[14] Thomas claims that judicial misconduct denied him due process of law as guaranteed by the due process clauses and equal protection clauses of the Fifth and Fourteenth Amendments, the confrontation clause of the Sixth Amendment, the double jeopardy clause of the Fifth Amendment, article I, §§ 2, 9, and article 22 of the Washington State Constitution. SAG at 34.

We affirm Thomas's conviction. We remand to the trial court to correct the judgment and sentence to delete the kidnapping charges (Pritchard counts VI and VII) and the second degree assault charge (Pritchard count II) and the kidnapping charge (Habersetzer count II).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.